

So It Goes – Part I

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In his novel *Slaughterhouse-Five*, Kurt Vonnegut Jr. used the memorable phrase ‘so it goes’ every time someone died. According to Vonnegut, the ‘Trafalmadorians’ started the practice, because they experience past, present and future in random order and so, to them, death is just someone having a bad day. Defining the Hungarian constitutional regime turns legal analysts into Trafalmadorians. We find that Hungarian democracy dies over and over again while appearing alive in between deaths, sometimes achieving both states almost simultaneously. We say “so it goes” one day only to have to say “so it goes” again the next.

On 10 November, Hungary has once again entered a state of emergency in which ordinary constitutional government is suspended. The new state of emergency responds to the fact that the second wave of the pandemic has hit Hungary very hard. As we write, Hungary is registering more than [6000 new cases per day with around 100 daily deaths](#) in a country of only 9.8 million people. More [Hungarians died of Covid-19 in October](#) than in the preceding four months combined. It’s not crazy to think that emergency measures might help. But, as usual in Hungary these days, the measures actually undertaken exceed those necessary to or even relevant for coping with the problem for which they are invoked and all of them could have been undertaken under ordinary law in any event. So it goes.

States of emergency have by now become normalized in Hungary so Prime Minister Orbán has introduced a new constitutional amendment that rewrites the entire section of the constitution regulating them. Under the new changes, any role for the Parliament during emergencies disappears and the government can govern alone. In addition, the situations in which emergencies can be declared have been expanded so that it will be easier to meet the threshold for declaring an emergency in the first place. The constitution will now magically fix all of the unconstitutional emergencies that have been accumulating since 2015, demonstrating once again that if the government keeps engaging in unconstitutional behaviour, the constitution can be changed to regularize it. So it goes.

At the same time, the new constitutional amendment substantially curtails rights of the LGBTIQ community, just when [the European Commission](#) has rolled out a new program for further recognizing LGBTIQ rights. So it goes.

The constitutional amendment also performs technical wizardry by redefining what counts as ‘public funds,’ allowing both EU and Hungarian state owned money to disappear down a rabbit hole into “public foundations” so that the money cannot be tracked by anti-corruption investigators. And this will be passed on the eve of the EU (probably) attaching [rule of law conditionality](#) to EU funds. So it goes.

As if this were not enough, the Hungarian government decided that this would be a perfect time to roll out its new election law, designed to wrong-foot the opposition

shortly after [the opposition finally managed to show a united front](#) in standing up to Orbán. So it goes.

In Part I, we will discuss the current states of emergency and the constitutional amendment that would make constitutional many currently unconstitutional elements of these emergencies, and in Part II, we will deal with the proposed constitutional amendment and laws removing LGBTIQ protections, encouraging corruption and changing the election law.

A Constitution of Emergencies

As the pandemic has taken a huge toll across Europe, the Hungarian government first declared and Parliament then expanded beyond current constitutional bounds a new state of emergency. This new emergency (a 'state of danger' in the existing Hungarian taxonomy of states of emergency) was announced by government decree on 3 November, and confirmed by the Parliament on 10 November when it passed a broad Enabling Act to give the government even more powers than it would be entitled to have under its current Fundamental Law (i.e. constitution). Predictably, the new state of emergency was enacted with only the votes of the governing party MPs. Like [the previous pandemic-related emergency](#) in March that stirred international fears, the November emergency gives the government the unlimited power to govern by decree. Unlike the previous emergency, and acknowledging international criticism, the government's extraordinary powers under the November emergency last only 90 days. According to the current constitution, however, a state of emergency only gives the government the power to issue decrees that endure for a maximum of 15 days, unless each decree is specifically renewed by the Parliament. But with this new November emergency, the Parliament has given its blanket endorsement to any decree that the government issues for 90 days without the need to return to Parliament for its approval. So Orbán governs alone without Parliament – again.

As the Fundamental Law now stands, it is flatly unconstitutional for the Parliament to issue a blank cheque for the government to issue endless emergency decrees for 90 days without parliamentary oversight. Last but not least the Parliament is also lacking the authority to prolong the declaration of the state of danger itself, although its November emergency law did so.

The concrete details of the new emergency were announced just moments before they entered into force on 11 November at midnight. Under the new emergency, as laid down in government decree [484/2020 \(XI. 10.\)](#), strict curfews between 8 p.m. and 5 a.m. are enforced by the military working with the police. All forms of assembly are prohibited in public places, and even in private places if more than 10 people are involved. Restaurants are closed (except for take-out). The hours of shops and other services are limited; all must close by 7 p.m. A general ban on public events is being enforced. While schools through grade 8 remain open, all other schools – including universities – are required to go virtual. Masks must be worn nearly everywhere outside one's home.

That may all sound not too different from what is happening in the rest of Europe until one ventures out into the streets after the curfew to see what this regime looks like in practice. Then, Hungary looks like a police state, as [military vehicles occupy the downtown areas of some cities](#), accompanied by [heavily armed soldiers](#) patrolling to enforce the new emergency regime. In addition, authorized by a new decree ([499/2020. \(XI. 13\)](#)), soldiers are taking up jobs in hospitals to assist the medical staff. Hungary may be the only country in the world where the pandemic is being fought with force of arms but that doesn't make it constitutional. Back in June, an amendment of the Military Act made it possible for the government to use the Hungarian Armed Forces in order to effectively handle a state of danger. According to paragraph 1 Article 50 of the Fundamental Law the Hungarian Armed Forces may be used during a state of emergency if the Police and the National Security Services are unable to handle the situation at hand and according to paragraph 3 of Article 45 of the Fundamental Law, the Hungarian Armed Forces are permitted to be called out for the prevention of disasters, as well as their mitigation and clean-up. But there is no provision for the use of the military in Article 53 of the Fundamental Law that regulates the 'state of danger' that is being used as the basis for the present emergency. Therefore, it seems that the changes to the Military Act amended the constitution by the back door.

So it goes.

The November 'state of danger' brings to three the number of current emergency regimes in effect in Hungary. They have become hard to track, so let us recap. The '[state of migration emergency](#),' initiated in 2015, is nowhere mentioned in the detailed regulation of states of emergency in the constitution. It has been perpetually renewed and remains in effect even in the absence of floods of incoming migrants that justified the initiation of this state of emergency in the first place (so it goes). In March 2020, at the height of the first wave of the pandemic, [the prime minister declared a 'state of danger'](#) under Article 53 of the Hungarian Fundamental Law, an emergency that would have come with appropriate constitutional constraints had the constitution been followed. But the constraints specified in the constitution were removed by the Parliament when it passed a law ([Enabling Act I](#)) permitting the government to endlessly renew its own emergency decrees and to do so until the government decided to give up those powers. Facing criticism from the EU, Prime Minister Orbán backed down and declared an end to the March emergency in June.

On the same June day when the government terminated the March 'state of danger,' however, the Parliament passed two laws, one rescinding the parliamentary confirmation of the March state of danger and the other which [we have previously described as the 'Enabling Act II'](#) that amended the Health Act to create a new 'medical state of emergency' that is nowhere mentioned in the detailed regulation of states of emergency in the constitution. This new form of emergency, like the migration emergency, was inserted into ordinary law without the constitutional scaffolding that guarantees that there are serious checks on emergency powers. But the 'medical state of emergency' provided that the operation of all institutions, programs or activities that could promote the spread of the epidemic could be suspended, gave the government the power to use special 'epidemic' measures

provided in other laws, and permitted this catalogue of special powers to be supplemented by future ordinary legislation. On 17 June the government activated this newly minted 'state of medical emergency' by decree but it seemed that, even with this unlimited power in hand, they didn't want to accept any restrictions in order to prepare for the second wave of the pandemic now in effect. Without using the Health Act's new framework to handle the situation, though it was still in place to be used, the government declared a state of danger on 3 November and soon after, Enabling Act III was passed as [our colleague Viktor Kazai already detailed](#) on the Verfassungsblog.

Taken together, the government is *systemically* using emergency powers as ordinary everyday authorizations for what it does, instead of replying sparingly on the emergency powers provided for in the constitution which have built-in protections against abuse. At this point, one can hardly figure out which actions taken by the government are 'ordinary' and which are 'emergency' measures. For example, under the camouflage of the declaration of state of emergency back in June, the government used its first emergency pandemic legislation to achieve its political aims by issuing decrees that cut off [funding to the political opposition](#). Now in November, they have invoked a different legal cover for fighting the pandemic. All three existing states of emergencies are unconstitutional. The state of migration emergency from 2015 as well as the June 2020 pandemic emergency are unconstitutional because they were both achieved by ordinary statute to evade direct invocation of the constitution, and the November 'state of danger' is unconstitutional in part because it unconstitutionally modifies some of the constitutional constraints that would prevent the abuse of emergency powers.

The Hungarian government is now so routinely using unconstitutional emergency powers to circumvent constitutional constraints that one must conclude that the government's main aim is to govern outside the very constitution that it wrote for itself a mere decade ago. At this point, it seems irrelevant whether this limitless power is achieved with or without the declaration of a constitutionally authorized state of emergency. Government unconstrained by the constitution in Hungary has become the norm and not the exception.

But of course, this is a government that is loudly proclaiming that it is committed to the rule of law as [it exercises it veto](#) over the EU budget and recovery fund in order to protest the adoption of a regulation that would require EU Member States to honor the rule of law in order to receive EU funds. So this situation of growing numbers of unconstitutional states of emergency must be remedied.

The new constitutional amendment introduced into the Parliament last week rewrites the structure of the 'Special Legal Orders' (that is, states of emergency) in such a way that these unconstitutional emergencies can be legalized.

First, the constitutional amendment removes from the constitution altogether an institution that most Hungarians have never heard of: The National Defence Council. The National Defence Council was supposed to govern in a crisis, especially if the Parliament could not meet, in order to ensure the continuation of representative government even in adverse circumstances. During a special legal order, the

government was supposed to convene this Council, which was to consist not only of the prime minister and president but also parliamentary leaders and the leaders of the opposition. Under the constitutional amendment, however, the National Defence Council disappears so that the prime minister governs alone in an emergency, as indeed the present prime minister has done under all the emergencies mentioned above.

In addition, the constitutional amendment compresses the current six special legal orders into three. The 'state of national crisis', the 'state of preventive defense' and 'unforeseen intrusion' from the present constitution will be collapsed into a new 'state of war' category while the 'state of emergency' and the 'state of danger' will retain their titles, although with relevant modifications in the circumstances in which they can be invoked. The much-criticized 'Emergency Response to Terrorism' from the current constitution will be not included in the new chapter. Regardless of which new emergency is invoked, however, it is evident that the government will play a central role in all three. Under the amendment, Parliament shall declare a special legal order with a supermajority, but after such a declaration, the government may rule extra-legally and unilaterally with special decrees. Again, that is what the prime minister has done mostly unconstitutionally under all emergencies to date, so this authorizes him to govern in this way going forward.

Perhaps the most important element in this revised constitutional regulation of special legal orders are the new provisions that substantially broaden the situations in which these emergencies can be declared. Under the present constitution, declaration of a 'state of emergency' requires the presence of 'armed actions' and/or 'violence committed by force of arms or by armed groups.' The government removed this requirement, allegedly in order to handle the possible cyber-attacks or other analogous emergencies that do not rely on physical violence. But in our reading the scope of the new provision has been greatly widened to include non-violent threats. The bar for declaring such an emergency has therefore been lowered.

The new 'state of danger' has also been broadened in a worrisome way. It may be declared when there are actions by those outside government who aim to undermine or sabotage (*'felforgatás'*) the constitutional order or who aim to seize exclusive control of power or who commit grave acts of violence or illegal acts which gravely endanger lives and property of citizens on a mass scale. But what is "sabotage"? It is a concept previously unknown in the Hungarian law and it has no clear definition. And what would constitute to seize exclusive control of power? Does advocating for a new constitution count? Running an election campaign for an opposition party? What are relevant 'illegal acts' under this amendment? Is it possible to declare a state of danger when students capture the building of a university peaceably to resist the government's arbitrary decisions during a pandemic and paint graffiti on the building? Are demonstrations against the government that incidentally damage private property enough? From the text it may well be that all of these actions would justify a 'state of danger'.

The constitutional amendment rewriting the rules on states of emergency not only regularizes what had been unconstitutional behaviour on the part of the current government but gives it broad, vaguely defined new powers with even fewer checks

and balances to use however the government sees fit. With this amendment, the exception has become the rule.

So it goes.

In Part II, we will explain other elements of the new constitutional amendment and legislative package currently before the Parliament.

